COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 025945-01**

John Mayo	Employee
Save On Wall Co.	Employer
Travelers Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and McCarthy)

APPEARANCES
Michael C. Akashian, Esq., for the employee
Michael K. Landman, Esq., for the employee at oral argument
David J. Crowley, Esq., for the insurer

HORAN, J. The insurer appeals a decision awarding the employee ongoing § 34 benefits based on an alleged work-related complex regional pain syndrome (CRPS). The insurer raises issues regarding the legal sufficiency of the medical evidence, and due process. Because we agree with the insurer the judge erred by failing to afford it an opportunity to rebut the employee's medical evidence, we vacate the decision and recommit the case for further proceedings consistent with this opinion.[1]

On June 16, 2001, the employee suffered an industrial injury when he stepped on a nail at work. The wound became infected, and a blood clot resulted. The employee sought treatment, but he continued to experience pain, accompanied by foot and leg numbness. (Dec. 87.) The employee received § 34 benefits as a result of the § 10A conference. (Dec. 86.) The insurer appealed the conference order to a full evidentiary hearing. It did not dispute liability, but raised the issues of extent of disability and causation. (Dec. 84.)

[1] Accordingly, we do not reach the issue(s) regarding the sufficiency of the employee's medical evidence.

Pursuant to G. L. c. 152, § 11A, Dr. David R. Campbell examined the employee. Dr. Campbell, as the impartial medical examiner, offered a diagnosis of chronic venous insufficiency, which could cause recurrent episodes of superficial phlebitis. However, Dr. Campbell did not causally relate that diagnosis to the employee's work injury; he felt the work incident was only responsible for a few weeks of disability. (Dec. 87-88.) The employee moved to introduce additional medical evidence, based on the inadequacy of Dr. Campbell's report, and the complexity of the medical issues. However, the judge postponed ruling on the motion, effectively compelling the parties to depose the doctor in the hope that this would cure the report's inadequacy.[2] (Tr. I, 18.)[3] The employee took Dr. Campbell's deposition on April 17, 2003. At the continued hearing, the judge allowed the employee's renewed motion to submit additional medical evidence, reasoning that the doctor had failed to offer an opinion on chronic pain.[4] (Tr. II, 17.)

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[2] We have concluded this practice is contrary to the plain meaning of § 11A. LaGrasso v. Olympic Delivery Serv. Inc., 18 Mass. Workers' Comp. Rep. 48, 57 (2004). However, that issue is not before us.

[3] Tr. I refers to the hearing of January 23, 2003; Tr. II refers to the continued hearing of May 20, 2003.

[4] We are troubled by the judge's statement that he was free to change his ruling on the employee's motion after the record closed, without providing them with any prior notice, and therefore not consider the additional medical evidence submitted by them:

> I have read the doctor's report. I have not read his deposition, though I intend to before writing my decision. At this point, I am going to allow in additional medical evidence. That said, when I write this decision, I'm going to read the report and the deposition of the doctor quite closely. And I reserve my right to change my mind, which I have done more often than I would like. But still – maybe eight or ten times over the course of the decade I've been here. So, I will give you the opportunity to get further medicals, and when we finish the lay testimony here today we will look at our calendars and see when we're going to do that.

(Tr. II, 17.) The judge further stated at the end of the hearing: "I've already ruled on the inadequacy of the impartial report, finding that it is inadequate. I will reassess and reconsider that finding at the time that I write the decision. But I will be accepting additional medicals into evidence before the record is closed." (Tr. II, 46.)

The judge allowed the parties until July 25, 2003 to submit additional medical evidence. Insurer's August 12, 2003 letter.[5] Only the employee did so, forwarding voluminous reports and records from his treating physicians. However, the employee's submission arrived at least ten days after deadline. The insurer objected to the late submission. Id. Without ruling on the insurer's objection, the judge filed his decision on October 22, 2003, awarding benefits to the employee. (Dec. 92.) In that decision, the judge adopted the unrebutted and unchallenged opinions of the employee's treating physicians. (Dec. 91.)

The insurer contends the judge's acceptance of the employee's tardy submission of medical evidence, over the insurer's timely objection, was arbitrary and capricious. We agree. The insurer was unaware that the judge had allowed the employee's late submission of medical evidence, and had ignored its motion, until it received the judge's hearing decision. As a result, the insurer had no realistic opportunity to address the employee's evidence by deposition, or by the submission of countervailing medical evidence.[6] A clearer due process violation is hard to imagine. See O'Brien's Case, 424 Mass. 16, 23 (1996)(failure of due process results from foreclosing "opportunity to present testimony necessary to present fairly the medical issues"). It must be borne in mind the insurer otherwise had no reason to introduce its own medical evidence, as the impartial physician's opinion clearly did not satisfy the employee's burden of proving

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[5] We take judicial notice of documents in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). We also note when employee's counsel submitted his medical evidence with a cover letter dated August 4, 2003, he did "apologize for the delay."

[6] We realize the insurer might have followed its objection to the late-submitted medicals by noticing the depositions of the employee's doctors, thereby possibly bringing the matter to a head before the judge wrote his decision. However, the failure to do so, particularly after the close of the record, does not cure the due process violation.

a work-related disability.[7]

The judge's allowance of the late-submitted additional medical evidence, particularly in light of the insurer's objection, should have been communicated to all parties prior to the issuance of the decision. The insurer should then have been afforded a reasonable time to respond to the new evidence of record. "Where there is an inability to cross-examine a medical witness, absent statutory exception, such physician's reports are not admissible in evidence." Murmes v. Gambro Health Care, 14 Mass. Workers' Comp. Rep. 13, 18-19 (2000). See Dunn v. U.S. Art Co., 18 Mass. Workers' Comp. Rep. 123, 125-126 (2004)(insurer's due process rights violated by failure of judge to notify it of exclusion of its additional medical evidence); Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 101(2004)("Self-insurer had no way of knowing that the judge was going to expand her ruling of inadequacy to include [reasonableness of surgery], and no opportunity to respond to such a ruling"); Behre v. General Elec. Co., 17 Mass. Workers' Comp. Rep. 273, 277 (2003)(judge ruled, in his decision, that impartial report was inadequate, and relied on conference medicals to reach his conclusion, without notification of action to parties; "[s]uch aberrant action [was] contrary to law"); Gulino v. General Elec. Co., 15 Mass. Workers' Comp. Rep. 378, 381 (2001)(adoption of "gap" medicals for present disability, without notification to the parties, was abuse of discretion); Martin v. Colonial Care Ctr., 11 Mass. Workers' Comp. Rep. 603, 606-607 (1997)(right to depose medical expert fundamental to due process). All of these cases are instructive on two important procedural points: A judge must be vigilant in assuring that the parties are timely apprised of all rulings to which they might respond, and a judge must consistently provide the parties with a reasonable opportunity to respond to any

[7] We note the report of the insurer's medical examiner, Dr. Mark Levovitz, was listed, oddly enough, as a hearing exhibit, even though neither party had sought its introduction into evidence. (Dec. 86.)

material change in circumstances. When such vigilance does not prevail, due process violations frequently – if not necessarily – result.

Accordingly, we vacate the decision awarding benefits, and recommit the case for further proceedings consistent with this opinion.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: January 3, 2005